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When Students Speak Away From School How Much Does The First Amendment Hear?*

by

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Controversies arising over the extent of the First Amendment speech rights of public school students while at school are resolved by an analysis of the familiar quartet of major decisions of the United States Supreme Court: *Tinker*,¹ *Fraser*,² *Kuhlmeier*,³ and *Morse*.⁴ While these decisions have not removed all uncertainty over the scope of student speech rights, they at least have divided these cases into distinct categories and identified the standard to be applied within each category. For example, if a student engages in personal, political expression in the school setting, *Tinker v. Des Moines Independent Community School District* requires the school administration to justify discipline of the student by showing that the speech created "substantial disruption of or material interference with school activities."⁵ However, if a student's speech occurs as part of a school-sponsored expressive activity, *Hazelwood School District v. Kuhlmeier* allows the school to censor the speech if it demonstrates "legitimate pedagogical concerns,"⁶ a less demanding standard than *Tinker*'s substantial disruption test.

By contrast to speech in the school setting, the Supreme Court has said nothing definitive on the subject of speech by public school students that occurs away from school. In the Court's most recent school speech decision, *Morse v. Frederick*,⁷ the speech at issue occurred outside the school building, but was characterized as part of a school-sponsored activity, similar to a school trip. Under these circumstances, the speech could be treated as though it had occurred at school since the students were still under the control of school

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¹ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (overturning discipline of students for wearing black armbands to school to protest the Vietnam War).

² *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (permitting school to discipline student for sexually suggestive speech at school assembly).

³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding censorship of school newspaper by high school principal).

⁴ *Morse v. Frederick*, 127 Sup. Ct. 2618 (2007) (allowing school to discipline student for speech reasonably perceived as advocating illegal drug use in light of school's strong anti-drug policy).

⁵ *Tinker*, 393 U.S. 503, 514.

⁶ *Kuhlmeier*, 484 U.S. 260, 273.

⁷ 127 Sup. Ct. 2618 (2007).

authorities.⁸ The Court made clear in *Morse* that “the outer boundaries” of the “school-speech precedents” were uncertain and that it was not resolving the issue of how similar off-campus speech would be treated outside the context of a school-sponsored, school-supervised activity.⁹

By contrast with student speech rights, it has long been established that schools can control the non-speech behavior of students outside the school setting in some circumstances.¹⁰ The theory of *in loco parentis* justifies this broad ranging school authority, at least where fundamental rights are not involved. For example, in *Clements v. Board of Trustees of Sheridan County School District No. 2*,¹¹ a state court upheld the discipline of a student for driving so as to endanger students on a school bus even though the behavior took place on a highway. The rationale of the opinion was that the conduct had “a direct and immediate effect on the discipline or general welfare of the school.”¹²

The absence of clear judicial authority on the rights of public schools to discipline students for protected speech¹³ that occurs away from school has led to a wide range of judicial opinions on this issue. Thirty years ago in *Thomas v. Board of Education, Granville Central School District*,¹⁴ the Second Circuit adopted a speech protective approach, limiting school authority to the punishment of on-campus speech and concluding that “the student is free to speak his mind when the school day ends.”¹⁵

⁸ *Id.* at 2624 (“Under these circumstances, we agree with the superintendent that Frederick cannot ‘stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.’”).

⁹ *Id.* (“There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts.”) (citation omitted).

¹⁰ *E.g.*, *Hutton v. State*, 5 S.W. 122, 123 (Tex. App. 1887) (“That the punishment was inflicted for an infraction of a rule of the school, which infraction was committed away from the school house, and not during school hours, did not deprive the teacher of the legal right to punish the pupil for such infraction.”).

¹¹ 585 P.2d 197 (Wyo. 1978).

¹² *Id.* at 204-05 (“It matters little that the proscribed conduct occurred on a public highway. It is generally accepted that school authorities may discipline pupils for out-of-school conduct having a direct and immediate effect on the discipline or general welfare of the school. This is particularly true where the discipline is reasonably necessary for the student’s physical or emotional safety and well-being of other students, teachers or public school property.”) (citations omitted).

¹³ If the speech at issue falls within one of the unprotected categories of speech, such as a true threat or fighting words, it is not protected by the First Amendment and can be punished if it occurs off-campus on the same basis as nonspeech conduct.

¹⁴ 607 F.2d 1043 (2d Cir. 1979).

¹⁵ *Id.* at 1052. *See also* *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004), *cert. denied*, 544 U.S. 1062 (2005) (refusing to apply the *Tinker* standard to a violent drawing made by a student off-campus and brought to campus without his knowledge two years later, and finding that the on-campus speech precedents were inapplicable).

The *Thomas* decision is the high water mark for the protection of off-campus student speech with most other courts recognizing some authority to discipline students for such speech. Many courts conclude that the authority of the school extends beyond speech that occurs at school so long as there is some "appropriate nexus"¹⁶ between the speech and the school. The easiest of these cases involve hybrid situations where the speech originates away from school, but reaches the school with the knowledge and consent of the student who authored the speech, such as the in-school distribution of an underground student newspaper written away from school,¹⁷ or a website shown to other students by its student creator while he was at school.¹⁸

A number of courts have addressed the issue of how to categorize the speech if it originated off-campus, but made its way onto campus by the actions of others. Some courts ignore the issue of who is responsible for the speech reaching campus, thus classifying such cases as identical to cases where the speaker brings the speech to campus, while others find this distinction relevant to the degree of protection offered the speech. In *Beussink v. Woodland R-IV School District*,¹⁹ a student was disciplined for creating a webpage that was critical of the administration at the high school he attended. In deciding to grant a preliminary injunction requested by the student, the court applied the *Tinker* test and ruled for the student based on the absence of disruption.²⁰ In reaching its decision, the court did not even discuss the fact that the speech at issue had been composed off-campus and that the student author had taken no steps to bring it to campus.

By contrast to *Beussink*, in *Killion v. Franklin Regional School District*,²¹ the court considered the on-campus/off-campus distinction in analyzing the case. In *Killion*, a student distributed a derogatory top-ten list about the school athletic director via e-mail. Copies of the list were brought to school and left in the teacher's lounge by an unidentified person and the student who composed the e-mail was suspended. In reviewing the suspension, the court applied the *Tinker* standard and concluded that the list had not caused disruption at the school.²² Recognizing some limit on the authority of school officials based on the fact

¹⁶ *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007).

¹⁷ See, e.g., *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827-28 (7th Cir. 1998) (court applied the *Tinker* test to uphold discipline of student for writing article about how to hack into school's computers that was published in an underground newspaper written and published off-campus, but distributed at school). See also *Donovan v. Ritchie*, 68 F.3d 14 (1st Cir. 1995).

¹⁸ See, e.g., *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) (finding that "there is a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus" based on the fact that the student had shown the site to another student and accessed it while at school and relying on that nexus to justify upholding the school's actions based on both the *Fraser* and *Tinker* standards).

¹⁹ 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

²⁰ *Id.* at 1180.

²¹ 136 F. Supp. 2d 446 (W.D. Pa. 2001).

²² *Id.* at 455.

that the list was composed away from school and not in connection with a school activity, the court refused to apply the *Fraser* standard despite the fact that the list could be classified as lewd.²³

Courts have upheld discipline of students for speech that occurs away from school even in situations where the speech is never viewed within the school. Typically, discipline is only justified in such cases if the off-campus speech has some on-campus impact. In *Klein v. Smith*,²⁴ a student encountered one of his teachers in a restaurant parking lot and gave him the finger. The student was suspended for violating a school rule that prohibited "vulgar or extremely inappropriate language or conduct directed to a staff member."²⁵ The United States District Court for the District of Maine overturned the suspension on the ground that the relationship between the student's gesture and the school was "too attenuated."²⁶ However, in *Wisniewski v. Board of Education of the Weedsport Central School District*,²⁷ the Second Circuit recently applied the *Tinker* test to uphold the authority of a school district to discipline a student for using a violent icon with accompanying threatening text directed at a teacher as part of an instant message sent to the student's buddy list based on its potential for disruption rather than based on any evidence of an on-campus effect.²⁸

The number of cases addressing the issue of student speech away from school remained small until the advent of the Internet. The Internet's ability to break down traditional geographic concepts and be everywhere and nowhere at once brought a reconsideration of the traditional on-campus, off-campus divide. Speech that is created off-campus is now seen as impacting the school environment with increasing frequency. Internet tools such as social networking sites create off-campus communities of students that mirror conversations at

²³ *Id.* at 457 ("Although we agree that several passages from the list are lewd, abusive, and derogatory, we cannot ignore the fact that the relevant speech, like that in *Klein* and *Thomas*, occurred within the confines of Paul's home, far removed from any school premises or facilities. Further, Paul was not engaged in any school activity or associated in any way with his role as a student when he compiled the Bozzuto Top Ten list.").

²⁴ 635 F. Supp. 1440 (D. Me. 1986).

²⁵ *Id.* at 1441.

²⁶ *Id.* But see *Fenton v. Stear*, 423 F. Supp. 767 (W.D. Pa. 1976). The court in *Klein* also rejected several arguments that the gesture should not be considered protected expression under the First Amendment. If the speech was unprotected, the school could have punished the student for off-campus conduct free of First Amendment constraints.

²⁷ 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 128 Sup. Ct. 1741 (2008).

²⁸ *Id.* at 40-41 ("[I]t was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted as being shot. The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of Aaron's classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable. And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment.") (footnote omitted). In *Wisniewski*, the court found it unnecessary to consider whether the icon could be classified as a true threat. *Id.* at 37-38.

lunch tables in the school cafeteria and broadcast those previously private conversations to a broader audience and with a higher degree of permanence. While online speech is quite impermanent because of how easily it can be altered or replaced, from the point of view of school authorities it seems all too indelible.

When these disputes wind up in court, courts increasingly find justifications for allowing public schools to discipline students for speech that occurs away from school. However, courts are also cognizant of the differences between student speech at school and speech away from school. One recent example of this delicate balancing act is found in the Second Circuit's decision in *Doninger v. Niehoff*.²⁹ In *Doninger*, a student wrote a posting on a blog that was highly critical of the school principal and contained disrespectful language including calling school administrators "douchebags."³⁰ While the court concluded that the student's speech could have been punished under the *Fraser* standard if it had occurred at school, it was reluctant to conclude that *Fraser* applied to off-campus speech and did not decide that issue. Instead, it evaluated the speech under the *Tinker* test and found that the speech "foreseeably create[d] a risk of substantial disruption within the school environment."³¹ While recognizing that the issue of whether schools are permitted to discipline students for off-campus speech is unresolved, the court pointed out that "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority."³²

While many courts take a similar approach to *Doninger* and permit discipline for off-campus online speech only if the school can satisfy the *Tinker* standard, there are exceptions to this middle ground approach. In *J.S. v. Blue Mountain School District*,³³ the United States District Court for the Middle District of Pennsylvania preferred a less speech protective approach. The court upheld the suspension of a student for using her home computer to create a fake MySpace profile of her school principal that portrayed him as "a pedophile and a sex addict."³⁴ Despite the fact that the court found that the degree of disruption caused by the profile did not satisfy *Tinker*, it nevertheless upheld the suspension based on its view

²⁹ 527 F.3d 41 (2d Cir. 2008).

³⁰ *Id.* at 45.

³¹ *Id.* at 50 (quoting *Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007), *cert. denied*, 128 Sup. Ct. 1741 (2008)).

³² *Id.* at 48-49 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring in the result)). The district court on remand in *Doninger* recently granted summary judgment for the school district as to all but one of the claims in the case. *Doninger v. Niehoff*, No. 3:07CV1129 (MRK), 2009 U.S. Dist. LEXIS 2704 (D. Conn. January 9, 2009). It allowed the case to continue on a claim that the school district violated the First Amendment by denying students permission to wear "Team Avery" t-shirts to protest the principal's decision to disqualify Ms. Doninger from running for senior class secretary.

³³ No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. September 11, 2008).

³⁴ *Id.* at *2.

that the speech could be regulated under *Fraser* and *Morse*.³⁵ Even though the speech took place off-campus, the court concluded it was sufficiently connected to the school to punish the speech using the same standards that would apply to on-campus speech.³⁶

The wide range of judicial views on the issue of when student off-campus speech can be the basis of discipline by school authorities makes it difficult for schools to develop sound policies to address this situation. Until a more definitive answer is provided by the U.S. Supreme Court, schools face this issue without clear judicial guidance.

³⁵ *Id.* at *17 ("It is more akin to the lewd and vulgar speech addressed in *Fraser*. It is also akin to the speech that promoted illegal actions in the *Morse* case.").

³⁶ *Id.* at *21-22 ("The facts that we are presented with establish much more of a connection between the off-campus action and on-campus effect. The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website. Plaintiff crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code. J.S. lied in school to the principal about the creation of the imposter profile. Moreover, although a substantial disruption so as to fall under *Tinker* did not occur, as discussed above, there was in fact some disruption during school hours. Additionally, the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school. On these facts, and because the lewd and vulgar off-campus speech had an effect on-campus, we find no error in the school administering discipline to J.S.") (citation omitted).